United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2295

ORIGINAL

In The

United States Court of Appeals

For The Second Circuit

FANNY HANDEL,

Plaintiff-Appellee,

vs.

MEYER GOLD,

Defendant-Appellant,

and

PRILL CORPORATION,

Defendant-Appellee.

On Appeal from an Order from the United States District Court — Southern District of New York

BRIEF FOR DEFENDANT-APPELLEE

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BRIEF FOR DEFENDANT-APPELLEE, PREL CORPORATION

Preliminary Statement

This is an appeal from an order denying the motion of defendant-appellant, Meyer Gold ("Gold"), to vacate a default judgment entered against him on January 18, 1974.

In denying Gold's motion, which motion seeks relief from a final judgment made pursuant to Fed. R. Civ. P. ("FRCP") 60(b)(1), the District Court (per Duffy, J.) expressly held that the "record in this case demonstrates . . . that the default was not due to mistake or excusable neglect" (Appendix* at 92a), though Gold grounded his motion solely on the "mistake" and "excusable neglect" aspects of Rule 60(b)(1). The District Court further found that

> "The persistence of [Gold] in ignoring the orders of this court, directed both to him and to his attorneys, constituted a blatant disregard for the process of justice." (A at 92a).

It is the position of defendant-appellee Prel Corporation (erroneously denominated, in the caption of the Appendix

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*References to the Appendix of defendant-appellant Gold hereinafter will be denominated "A".

of Gold, solely as "defendant" and hereinafter referred to as "Prel") that the record herein clearly supports the findings and conclusion of the District Court and affords no basis whatsoever for relief under FRCP Rule 60(b)(1).

Counterstatement of Issue

Did Gold sustain his burden of showing that the judgment entered herein arose out of "mistake" or "excusable neglect" within the meaning of FRCP 60(b)(1)?

Counterstatement of Facts

Plaintiff, Fanny Handel, a stockholder of Prel, brought this derivative action for the benefit of nominal defendant Prel. The complaint alleges that Gold, within a period of less than six months after Gold's acquisition, on September 16, 1971, of at least 265,647 shares of Prel's common stock, which constituted more than ten percent (10%) of Prel's then total outstanding common stock, sold at least 65,647 shares of Prel common stock at a profit. Such profit, the complaint alleges, inures to and is recoverable by Prel under and by virtue of Section 16(b) of the

Securities Exchange Act of 1934, as amended, 15 U.S.C §78p(b). (A at 10a-12a). Judgment, by default, was entered against Gold in favor of Prel on January 18, 1974. (A at 67a). The affidavit of Stanley L. Kaufman, Esq. in opposition to the subject motion for relief from final judgment (A at 24a), together with the exhibits annexed thereto, sets forth in detail the continual disregard of the processes and orders of the District Court, which disregard resulted in the entry of the judgment from which relief is now sought. There is no need to repeat again in detail Gold's course, throughout this action, of abuse and disregard of the processes and orders of the District Court. The following summary of the proceedings disregarded by Gold will demonstrate, however, the very substantial extent to which processes and orders of the District Court were ignored by Gold.

Gold was served personally with the summons and complaint, together with plaintiff's interrogatories, on January 15, 1973 (A at 24a). Thereafter, Gold's New Jersey attorneys, Messrs. Kaufman and Kaufman, requested an extension of time to answer until February 25, 1973, which was granted (A at 25a). On March 12, 1973,

Gold interposed an answer by the firm of Finkelstein, Benton & Soll (A at 13a, 25a), 515 Madison Avenue, New York, New York 10022.

On April 13, 1973, plaintiff's attorneys notified Gold's attorneys of their default in answering the interrogatories (A at 25a). In April 1973, the attorneys for all parties were served with a notice to appear on May 29, 1973 at 4:00 o'clock in the afternoon before Judge Dudley B. Bonsal for a pre-trial conference to fix a trial date (A at 25a, 36a).

On May 2[illegible], 1973, plaintiff served and filed motion papers, returnable at the pre-trial conference on May 29, 1973, for an order striking Gold's answer and/or directing that the interrogatories be answered (A at 25a, 38a-42a).

At the pretrial hearing on May 29, 1973, no one appeared on behalf of Gold (A at 25a). Judge Bonsal therefore directed that an order be submitted upon notice to strike Gold's answer unless Gold answered on or before July 2, 1973, each and every interrogatory propounded by plaintiff (A at 26a, 44a-46a). As shown by proof of service which is part of the record herein, this order was served by mail

upon Gold's attorneys of record, Messrs. Finkelstein, Benton & Soll, as well as Messrs. Kaufman & Kaufman and Messrs. Borden & Ball (A at 46a). Gold nonetheless did not answer plaintiff's interrogatories (A at 26a).

By notice of motion dated October 5, 1973 (A at 47a), returnable October 15, 1973 before Judge Bonsal, plaintiff moved for (i) a judgment by default pursuant to FRCP 55, (ii) an inquest or hearing before the Court to determine the amount of damages and (iii) an award of attorneys' fees pursuant to FRCP 37. Notice of this motion also was served by mail upon Messrs. Finkelstein, Benton & Soll (A at 51a). At the hearing before Judge Bonsal on October 15, 1973, Gold again did not appear (A at 26a), and Judge Bonsal directed that a proposed order with notice of settlement be served upon the defendant (A at 26a). The proposed order with notice of settlement was so served on October 15, 1973 (A at 56a).

That proposed order (the "Order") was presented for settlement before Judge Bonsal on October 22, 1973 (A at 53a), was signed by Judge Bonsal on October 23, 1973 (A at 55a),

and was entered by the clerk on October 26, 1973. The Order directed that an inquest be held before Magistrate Jacobs on November 29, 1973 (subsequently adjourned to December 19, 1973) to determine the amount of damages for which the plaintiff should have judgment and the amount of attorneys' fees to be awarded to plaintiff. By letter dated December 3, 1973 (A at 62a), Messrs. Finkelstein, Benton & Soll were notified of the inquest scheduled for December 19, 1973. The Order directing the aforementioned inquest was duly served upon Gold's attorneys on December 5, 1973 (A at 66a).

On December 19, 1973, the aforesaid inquest was held before Magistrate Jacobs. Neither Gold himself nor his attorneys attended. After a full hearing in which evidence was introduced, on January 2, 1974, Magistrate Jacobs rendered his report recommending the entry of judgment for plaintiff in the amount of $150,000 plus interest thereon and attorneys' fees (A at 27a, 67a).

On January 8, 1974, Judge Bonsal approved Magistrate Jacobs' report (A at 27a, 67a) and judgment pursuant thereto (the "Judgment") was entered on January 18, 1974 (A at 67a).

On February 6, 1974, plaintiff served upon Gold by registered mail, and upon Messrs. Finkelstein, Benton & Soll, by ordinary mail, a notice to take Gold's deposition "pursuant to Rule 69 of the Federal Rules of Civil Procedure in aid of the judgment against said MEYER GOLD, entered January 18, 1974" (A at 28a, 70a-73a). Gold, having unquestionably so received notice of the Judgment as well as of his deposition, nonetheless defaulted in appearing (A at 28a, 79a-81a). And Gold apparently took no other remedial steps with respect to the Judgment or his noticed deposition.

On March 1, 1974, the Judgment of the District Court for the Southern District of New York, was certified by the Clerk for registration in another district (A at 74a) and was thereupon registered in the United States District Court for the District of New Jersey (A at 28a). Real property, apparently owned by Gold, thereafter was attached (A at 28a). Orly thereafter, when Gold finally faced the prospect of having to satisfy the Judgment, did he show any respect for the judicial process. On July 17, 1974, Messrs. Lampert & Lampert served a notice of motion on behalf of Gold for an order to vacate and to set aside the Judgment

"on the grounds of mistake and excusable neglect" pursuant to FRCP Rule 60(b). Notwithstanding the conclusory affidavits of Gold and his attorney and the unsworn letter of Gold's accountants in support of the motion, the District Court summarily denied Gold's motion after a full hearing thereon and an asserted complete review of the entire record of this case. Thereafter, Gold brought the instant appeal.

POINT I

GOLD FAILED TO DEMONSTRATE MISTAKE OR EXCUSABLE NEGLECT WITHIN THE REQUIREMENTS OF FRCP 60(b) NECESSARY TO VACATE THE JUDGMENT HEREIN.

In the Court below, Gold submitted only his personal one-page affidavit (the "Gold affidavit") and the two-page affidavit of his attorney (the "Lampert affidavit"), to which there was attached an unsworn letter of Gold's accountants, in support of his claim of mistake and excusable neglect. Except for the hearsay statement in the Lampert affidavit that the failure of Gold to answer the interrogatories "was due to a misunderstanding on the part of the defendant" and the conclusory assertion of Lampert that Gold "has a meritorious

defense to this action", the Gold affidavit is the only "evidence" of the alleged mistake or excusable neglect which was presented to the District Court in support of the motion, the denial of which is here appealed.

Gold's Affidavit

In addition to the conclusory statements that Gold did not make any short-swing profits, that the amount of the Judgment is "insignificant as to Prel" but "important to [Gold]", and that "there is a good and valid defense to such action which should be presented in fairness . . .", there is proffered, in support of the proposition that mistake or excusable neglect existed in this matter, the following:

a. It was Gold's understanding that the action "was to be primarily responded to by Prel Corporation and through New York counsel . . . ." (Gold affidavit, par. 1, A at 9a).

b. Although Gold "received a notice for such examination", he "was led to believe that the Prel Corporation officers with [sic] the subject matter thereof and that it

was not necessary for me to attend." (Gold affidavit, par. 2, A at 9a).

c. The Judgment entered herein was "based upon the fact that I did not attend such hearings for questioning, which was only through mistake on my part and the honest belief that it was not required." (Gold affidavit, par. 3, A at 9a).

No facts or evidence of any kind, to support the conclusions contained in the Gold affidavit, are proffered. Under controlling law, Gold has completely failed to meet the heavy burden of proof as to mistake or excusable neglect which falls upon the party seeking relief from a final judgment under FRCP 60(b). See Wilkin v. Sunbeam Corporation, 466 F.2d 714, 717 (10th Cir.), cert. denied, 409 U.S. 1126 (1973). Moreover, because the purported mistake or inadvertency is not particularized, but, rather, is merely couched in general statements, Gold has wholly failed to sustain his burden of proof. Atlantic Steamers Sup. Co. v. International Mar. Sup. Co., 268 F. Supp. 1009, 1011 (S.D.N.Y. 1967). Reliance upon Prel, as the party for whose benefit this action was brought, to represent Gold's interests or

to keep him advised as to the progress of the action has been rejected as grounds for FRCP 60(b) relief. Universal Film Exchanges, Inc. v. Lust, 479 F.2d 573, 576 (4th Cir. 1973).

A showing of mere carelessness or negligence does not constitute either inadvertence, mistake or excusable neglect sufficient to warrant the relief contemplated by FRCP 60(b). Geigel v. Sea Land Service, Inc., 44 F.R.D. 1, 2 (D. P.R. 1968). Simply stated, the inadvertence or mistake must be excusable and "[n]either ignorance or carelessness on the part of a litigant or his attorney will provide grounds for Rule 60(b) relief." Bershad v. McDonough, 469 F.2d 1333, 1337 (7th Cir. 1972) (citations omitted; emphasis supplied).

Lack of diligence precludes a finding of excusable neglect. Greco v. Reynolds, 416 F.2d 965 (3rd Cir. 1969). At the very least, Gold's repeated disregard of the orders and processes of the District Court for a period of approximately 15 months constitutes such a "lack of diligence" which precludes a finding of excusable neglect.

In the case at bar, no substantive facts showing excusable neglect or mistake were presented to the District Court. The court in Caputo v. Globe Indemnity Company,

41 F.R.D. 436 (E.D. Pa. 1967), stated, at 440, that a person seeking relief under Rule 60(b)(1) may prevail: "... only if he could show that judgment was entered against him because of some wrongdoing or misconduct of the [opposing party] . . . or because of an accident or mistake 'unmixed with any fault or negligence in [movant] or his agents'". (Citations omitted; emphasis supplied.) The record herein demonstrates no wrongdoing or misconduct on the part of either plaintiff or Prel. Even if this Court were to differ with the District Court's finding that the record discloses no mistake or excusable neglect, under no circumstances could such mistake or negligence be deemed "unmixed with any fault or negligence" of Gold or his agents.

POINT II

THE DENIAL BY THE DISTRICT COURT OF RELIEF UNDER FRCP 60(b) WAS NOT AN ABUSE OF DISCRETION AND MAY NOT BE REVERSED

FRCP 60(b) provides, in relevant part, as follows:

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final

> judgment . . . for the following reasons: (1) mistake, inadvertence . . . or excusable neglect . . . . The motion shall be made within a reasonable time . . . and . . . not more than one year after the judgment . . . was entered or taken . . . ." (Emphasis added.)

Whether there exists a sufficient showing of inadvertence or excusable neglect is purely a matter of discretion with the trial court. Smith v. Stone, 308 F.2d 15, 17, 18 (9th Cir. 1962); Universal Film Exchanges, Inc. v. Lust, supra; Central Operating Co. v. Utility Workers of America, 491 F.2d 245, 252 (4th Cir. 1974); Geigel v. Sea Land Service, Inc., supra. The court stated in Geigel as follows:

> "Even where a party makes a showing of mistake, inadvertence, surprise or excusable neglect, his right to have judgment set aside is not absolute, and whether judgment can be set aside rests in the sound discretion of the court." (Citation omitted.) 444 F.R.D. at 2.

Accord, Nederlandsche Handel - Maatschappij, N.V. v. Jay Emm, Inc., 301 F.2d 114, 115 (2d Cir. 1962); Atchison, Topeka and Santa Fe Railway Co. v. Barrett, 246 F.2d 846, 849 (9th Cir. 1957).

As this Court recently stated in Flaks v. Koegel, 504 F.2d 702, 707 (2d Cir. 1974), "There is no doubt but that the sanction of judgment by default,

although most severe, is within the sound discretion of the trial judge." (Citations omitted.)

Certainly where, as in the case at bar, there has been no showing of mistake, inadvertence, surprise or excusable neglect, the denial by the District Court of the application for relief from the Judgment may not be construed as an abuse of discretion.

The cases cited by Gold do not hold otherwise and are factually distinguishable. In Erick Rios Bridoux v. Eastern Airlines, 214 F.2d 207 (D.C. Cir.), cert. denied, 314 U.S. 821 (1954), cited by Gold, the judgment debtor had not been represented by counsel at the time of the entry of a default judgment, such counsel having withdrawn nineteen months prior to the entry of judgment, and the judgment debtor "never received actual notice of the withdrawal of his counsel or of any proceedings leading to the default judgment until after it had been entered." 214 F.2d at 209 (Footnote omitted). Since Gold was represented below (formally and of record by New York counsel and informally by New Jersey counsel), any reliance upon Erick is misplaced.

In circumstances instructive to the situation at bar, the Seventh Circuit in Beshear v. Weinzapfel, 474 F.2d 127, 134 (7th Cir. 1973), expressly adopted the following standards "collected in Particle Data Laboratories, Inc. v. Coulter Electronics, Inc., 420 F.2d 1174, 1178 (7th Cir. 1969)":

> "'Generally, an appellate court may set aside a trial court's exercise of discretion only if the exercise of such discretion could be said to be arbitrary.' Sears, Roebuck and Co. v. American Mutual Liability Insurance Co., 7 Cir., 372 F.2d 435, 438 (1967).
>
> "'[D]iscretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.' Delno v. Market St. Ry. Co., 9 Cir., 124 F.2d 965 (1942)."

The fact that the Judgment herein is substantial does not, by itself, have any bearing upon Gold's asserted right to relief therefrom or reversal of the decision below. In Ledwith v. Storkan, 2 F.R.D. 539 (D. Neb. 1942), after reviewing the relevant authorities relating to the showing required for relief from final default judgments, the court admonished, at 544-545:

"The vacation of a default judgment duly entered without fraud or overreaching, is not an action which the court should take arbitrarily or as a courtesy or favor to the losing party. Unless and until he shows that his default and the resultant judgment are attributable to his 'mistake, inadvertence, surprise or excusable neglect', the rule invoked confers no authority upon the court to vacate the judgment and allow him to answer. In the absence of such a showing, the judgment must stand regardless of any inclination towards indulgence to which the court may be prompted."

POINT III

THERE WAS NO DENIAL OF DUE PROCESS.

Gold relies upon statements of the Supreme Court in Societe Internationale, Etc. v. Rogers, 357 U.S. 197 (1958), in support of his assertion that "the District Court's action plainly violated the defendant's constitutional rights . . . ." (Gold's brief at 22). Again, Gold's reliance is misplaced. Societe Internationale, Etc. v. Rogers involved, inter alia, a request for relief from the dismissal of an action pursuant to FRCP 37 for failure to comply with a discovery order. The Supreme Court, after noting, at 209, that " . . . there are constitutional limitations upon the power of courts, even in aid of their

own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause," went on to add that "[t]he authors of Rule 37 were well aware of these constitutional considerations." 357 U.S. at 209 (citation omitted). The Court thereafter specifically held, at 212, that:

> ". . . Rule 37 should not be construed to authorize dismissal of this complaint because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner." (Emphasis added.)

Gold has not demonstrated any inability to comply with the repeated orders of the District Court, but, rather, an utter disregard for the District Court's lawful orders and processes. Accordingly, the comforting umbrella of "denial of due process" cannot shield Gold from his repeated failures to respect the orders and processes of the District Court.

Gold further asserts a right to a "full evidentiary hearing" upon the authority of Flaks v. Koegel, supra. In Flaks, the District Court (per Lasker, J.) entered an

order striking the defendants' answer because of the failure of the defendants to respond fully to interrogatories which had been served and because of the failure of defendant Koegel to appear at a deposition of David I. Koegel Enterprises, Inc., a corporation wholly owned by Koegel and his wife. The order also directed the clerk to enter a default judgment in the amount sought in the complaint, including punitive damages, plus interest. A motion to vacate the default judgment under FRCP 60(b) was made but denied by the court, without a hearing, in a memorandum order. Final judgment in the sum of $919,147.50, which included punitive damages of $400,000, was entered by the clerk of the court. There had been no proof of, or hearing to ascertain, damages. On appeal, this Court, upon a factual record bearing no resemblance to the factual background of the instant action, and relying upon Societe International, Et _ . Rogers, supra, remanded Flaks to the District Court for an evidentiary hearing ". . . so that appropriate findings may be made consonant with the due process standards we have discussed." 504 F.2d at 713.

Gold's reliance upon Flaks in aid of his position, however, is not sustainable. The Judgment below clearly

did not overstep the constitutional limitations upon FRCP 37 set forth by this Court in Flaks; likewise, the District Court's denial of Gold's Rule 60(b)(1) application, made six months after entry of the Judgment and more than five months after precise personal notice to Gold of its existence, in no way compromised Gold's rights to due process. Indeed, the record is clear that it was Gold himself who ignored and abused due process in the proceedings below. Without repeating in detail the complex factual situation in Flaks, of which this Court undoubtedly is cognizant, the following major factual distinctions between the posture of the defendants in Flaks and the posture of Gold are instructive:

(i) In Flaks, there was a prolonged and bitter adversary pretrial discovery controversy ranging over an eighteen month period. In the instant action, there was a complete and total disregard by Gold of all notices and orders requiring discovery.

(ii) In Flaks, in response to a communication from the District Court, Koegel's personal attorney advised the

District Court that Koegel was unable to retain new counsel (his former counsel having made an application to be relieved) and requested a hearing so that Koegel might testify and prove his arguments by documentary evidence. In the instant action, there was no application by Gold's counsel to be relieved as counsel of record and there was no specific request by Gold or his counsel for a hearing for the purpose of setting forth documentary evidence.

(iii) In Flaks, Koegel had answered one hundred twenty-six (126) of some one hundred thirty (130) interrogatories propounded to him; Koegel further had taken the position that either counsel had been supplied with the information necessary to answer the remaining interrogatories or that more time was required to respond. In the instant action, no effort whatsoever was made by Gold to answer any of the interrogatories and none, in fact, was answered.

(iv) In Flaks, the order for judgment was based, not on evidence produced at any hearing but, rather, on the affidavits of counsel for plaintiffs as well as the failure of defendants to comply with discovery orders. In the instant

action, the liability of Gold, as well as the quantum of damages, was established at a full hearing before Magistrate Jacobs.

(v) In Flaks, in addition to the defendant's affidavit made in support of a motion under FRCP 60(b), Koegel's former counsel submitted an affidavit on the motion as amicus curiae. In the instant action, no affidavits were submitted by Gold's attorneys of record, Messrs. Finkelstein, Benton & Soll, or Gold's private attorneys, Messrs. Kaufman & Kaufman.

(vi) In Flaks, the affidavits made in support of the Rule 60(b) motion presented the defendants' position in detail. In the instant action, the affidavits made in support of Gold's Rule 60(b) motion presented only conclusory and heresay statements.

(vii) In Flaks, the District Court, without any hearing, denied the Rule 60(b) motion. In the instant action, the District Court offered Gold (who apparently chose not to attend personally the hearing on his Rule 60(b) motion), through his present counsel, Messrs. Lampert & Lampert, who

appeared at such hearing, every opportunity to present, at such time, facts to support a showing of mistake or excusable neglect. Gold's attorneys failed to make any such showing.

There is, simply, no similarity between the situation at bar and the situation before this Court in Flaks. If relief from final judgment under FRCP 60(b) is afforded under the circumstances present in the case at bar, it is difficult to conceive of any circumstance in which similar relief will not be granted. The result would be a complete emasculation of those provisions of the Federal Practice Law and Rules which provide for entry of judgment by default for various reasons including, specifically, failure to comply with discovery orders.

In summary, Gold's belated and erroneous statement before this Court that he was denied due process is without basis in law or in fact.

POINT IV

GOLD IS BOUND BY THE ACTS AND OMISSIONS OF HIS ATTORNEY OF RECORD HEREIN AND IS CONCLUSIVELY CHARGED WITH ALL NOTICE GIVEN SUCH ATTORNEY.

One of the primary bases upon which Gold seeks relief under FRCP 60(b) is his assertion that the Judgment was entered herein "without notice" of any kind to him (A at 9a). Because the record herein is replete with notice of all proceedings to the attorneys who appeared in this action on behalf of Gold, this argument is without merit. Under settled law, Gold is bound by the acts of his counsel and is considered to have had notice of all facts communicated to such counsel. Link v. Wabash R.R. Co., 370 U.S. 626 (1962).

In Link v. Wabash R.R. Co., the Supreme Court held that a District Court has inherent power to dismiss an action without affording notice or providing an adversary hearing, and did not abuse its discretion in so dismissing, where plaintiff's counsel failed to appear at a duly scheduled pre-trial conference. The Court stated, by Mr. Justice Harlan, at 633-634, as follows:

> "There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposed an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation,

> in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.' Smith v. Ayer, 101 U.S. 320, 326, 25 L. Ed. 955." (Footnote omitted.)

Neither ignorance nor carelessness on the part of counsel (certainly not established on the record below) will provide grounds for relief under FRCP 60(b). Hoffman v. Celebrezze, 405 F.2d 833 (8th Cir. 1969); Geigel v. Sea Land Service, Inc., supra; Flett v. W. A. Alexander & Co., 302 F.2d 321 (7th Cir. 1962); Smith v. Stone, supra.

Since the record herein discloses notice not only personally to Gold in certain instances, but,at all times to his counsel, there existed no lack of notice to Gold. The record does not support Gold's assertion that grounds for relief for "mistake" or "excusable neglect" exist because, inferentially, he did not personally consent to his failure to answer the interrogatories or otherwise appear before the District Court. The Second Circuit summarily rejected such a contention in Nederlandsche Handel - Maatschappij, N.V. v. Jay Emm, Inc., supra, terming it "wholly frivolous." 301 F.2d at 115.

Flaks v. Koegel, supra, is heavily relied upon by Gold for several propositions, including this Court's statement therein that "[i]f counsel rather than the client were at fault and if serious efforts to obtain new counsel had been made under the handicaps described, then the order entering the default judgment was an abuse of discretion." 504 F.2d at 712 (citations omitted; emphasis supplied). In Flaks, however, counsel for the judgment debtor withdrew with formal notice to the court during pretrial proceedings and the court was in possession of a letter from private counsel for the judgment debtor asking for a later hearing on the grounds that he was abroad and required time to prepare his defense with new counsel. The record in the instant case at bar is devoid of facts similar to the factual situation before the District Court in Flaks and, accordingly, reliance thereon is again misplaced.

CONCLUSION

Gold has completely failed to demonstrate mistake or excusable neglect within the requirements of FRCP 60(b)

necessary to entitle him to relief from final judgment. The District Court did not abuse its discretion and, on the record before it, had no alternative but to deny Gold's motion under FRCP 60(b) and this Court should affirm.

Respectfully submitted,

BORDEN & BALL
Attorneys for Appellee
Prel Corporation

Of Counsel:

Stephen Sussman
Michael J. Thomas

A 202 Affidavit of Personal Service of Papers H LUTZ APPELLATE PRINTERS INC.

US COURT OF APPEALS

HANDEL,

Plaintiff-Appellee,

against

GOLD,

Defendant-Appellant.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, James Steele, being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

250 West 146th Street, New York, New York

That on the 8th day of January 1975 at *

deponent served the annexed Brief upon

*

the in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein,

James Steele

Print name beneath signature

JAMES STEELE

Sworn to before me, this 8th day of January 1975

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975

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